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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 JERRY DEWAYNE ELKINS,

12 Petitioner,

13 v.

14 VICTORVILLE U.S.P.,

15 Respondent.
16

Case No. CV 18-06973-RGK (RAO)

ORDER SUMMARILY DISMISSING
PETITION FOR WRIT OF HABEAS
CORPUS FOR LACK OF
JURISDICTION

17 **I. BACKGROUND**

18 On August 14, 2018, the Court received from Petitioner Jerry Dewayne
19 Elkins (“Petitioner”) a Petition for Writ of Habeas Corpus by a Person in Federal
20 Custody pursuant to 28 U.S.C. § 2241 (“Petition”). (Pet., Dkt. No. 1.) Petitioner
21 seeks relief from his sentence based on his actual innocence, shackling during his
22 criminal trial, and ineffective assistance of counsel. (*See* Pet. at 5-8.)¹

23 Petitioner is a federal prisoner currently incarcerated at the United States
24 Penitentiary in Victorville, California. Petitioner’s incarceration is the result of a
25 2013 conviction in the United States District Court for the Eastern District of
26 Missouri following Petitioner’s trial for conspiracy to commit racketeering, in
27

28 ¹ The Court cites to the Petition using the automatic pagination provided by the Court’s
electronic docket.

1 violation of 18 U.S.C. § 1962(d) (count 1), and conspiracy to commit murder in aid
2 of racketeering activity, in violation of 18 U.S.C. § 1959(a)(5) (count 13). *See*
3 Judgment, *United States v. Smith, et al.*, No. 4:11-cr-00246-CDP-12 (E.D. Mo.),
4 Dkt. No. 1491.² The District Court sentenced Petitioner to a term of 210 months
5 imprisonment on count 1 and 120 months imprisonment on count 13, to run
6 concurrently for an aggregate term of 210 months. *Id.*

7 Petitioner appealed to the Court of Appeals for the Eighth Circuit, where he
8 challenged the sufficiency of the evidence and argued that the District Court abused
9 its discretion by not utilizing a special verdict form. *See United States v. Henley*,
10 766 F.3d 893, 909, 914-15 (8th Cir. 2014). The Eighth Circuit disagreed, affirming
11 the judgment of the District Court. *Id.* at 916-17. The United States Supreme
12 Court denied the petition for writ of certiorari on May 4, 2015. *See Henley v.*
13 *United States*, 135 S. Ct. 2065, 191 L. Ed. 2d 968 (2015).

14 On May 6, 2016, Petitioner filed a motion pursuant to 28 U.S.C. § 2255 in
15 the Eastern District of Missouri. *See Elkins v. United States*, No. 4:16-cv-00645-
16 CDP (E.D. Mo.), Dkt. No. 1. On November 6, 2017, Petitioner moved to amend
17 his motion to include a claim under *Johnson v. United States*, 135 S. Ct. 2551, 192
18 L. Ed. 2d 569 (2015), and *Dimaya v. Lynch*, 803 F.3d 1110, 1111 (9th Cir. 2015),
19 requesting that his convictions be vacated because conspiracy to commit murder no
20 longer qualifies as a crime of violence. *See Elkins v. United States*, No. 4:16-cv-
21 00645-CDP (E.D. Mo.), Dkt. No. 12. On April 9, 2018, the District Court denied
22 Petitioner's section 2255 motion. *See id.*, Dkt. No. 19. The District Court also
23 denied leave to amend, concluding that it would be "futile" because Petitioner was
24 not sentenced under the Armed Career Criminal Act or classified as a "career

25 ² The Court takes judicial notice of the dockets of the Eastern District of Missouri and of
26 the Court of Appeals for the Eighth Circuit in the cases involving Petitioner cited herein. *See*
27 Fed. R. Evid. 201 (providing that a court may take judicial notice of adjudicative facts that "can
28 be accurately and readily determined from sources whose accuracy cannot reasonably be
questioned"); *Harris v. Cty. of Orange*, 682 F.3d 1126, 1131-32 (9th Cir. 2012) (noting that a
court may take judicial notice of federal and state court records).

1 offender,” and thus *Johnson* did not apply. *See id.* Petitioner filed a motion to
2 amend or alter the judgment, which was denied on May 16, 2018. *See id.*, Dkt.
3 Nos. 22, 23.

4 On May 24, 2018, Petitioner appealed the District Court’s denial of his
5 section 2255 motion, which the Eighth Circuit treated as an application for
6 certificate of appealability. *See Elkins v. United States*, No. 18-2122 (8th Cir.),
7 Dkt. No. 1. The Eighth Circuit declined to act on Petitioner’s August 14, 2018
8 motion for second or successive 2255 petition, which he filed “in the event of a[n]
9 adverse decision of [his] pending circuit case.” *See id.*, Dkt. No. 9.

10 **I. STANDARD OF REVIEW**

11 Petitioner seeks relief by way of a habeas petition under 28 U.S.C. § 2241. A
12 Court may apply the Rules Governing Section 2254 Cases in the United States
13 District Courts to other types of habeas corpus actions, including actions under 28
14 U.S.C. § 2241. *See* Rule 1(b) of the Rules Governing Section 2254 Cases; *Lane v.*
15 *Feather*, 584 F. App’x 843 (9th Cir. 2014); *Philip v. Tews*, No. CV 16-01987 CJC
16 (AFM), 2016 WL 1732699, at *2 n.2 (C.D. Cal. Apr. 29, 2016).

17 Under Rule 4 of the Rules Governing Section 2254 Cases, the Court may
18 dismiss a petition “[i]f it plainly appears from the petition and any attached exhibits
19 that the petitioner is not entitled to relief in the district court.”

20 **II. DISCUSSION**

21 Petitioner asserts that his petition satisfies the exception for section 2255
22 petitions and is properly brought as a section 2241 petition. (*See* Pet. at 2, 4-5.)
23 For the reasons that follow, the Court finds that Petitioner cannot proceed with a
24 section 2241 petition in this District.

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1 **A. The Requested Relief is Properly Sought in a Section 2255 Motion**

2 Section 2255 provides:

3 A prisoner in custody under sentence of a court
4 established by Act of Congress claiming the right to be
5 released upon the ground that the sentence was imposed
6 in violation of the Constitution or laws of the United
7 States, or that the court was without jurisdiction to impose
8 such sentence, or that the sentence was in excess of the
9 maximum authorized by law, or is otherwise subject to
 collateral attack, may move the court which imposed the
 sentence to vacate, set aside or correct the sentence.

10 28 U.S.C. § 2255(a). “The general rule is that a motion under 28 U.S.C. § 2255 is
11 the exclusive means by which a federal prisoner may test the legality of his
12 detention” *Stephens v. Herrera*, 464 F.3d 895, 897 (9th Cir. 2006). That is, as
13 a general matter, “motions to contest the legality of a sentence must be filed under
14 § 2255 in the sentencing court, while petitions that challenge the manner, location,
15 or conditions of a sentence’s execution must be brought pursuant to § 2241 in the
16 custodial court.” *Hernandez v. Campbell*, 204 F.3d 861, 864 (9th Cir. 2000) (per
17 curiam); *see* 28 U.S.C. §§ 2241(d), 2255(a).

18 Petitioner is a federal prisoner, and his Petition contests the legality of his
19 sentence rather than the manner, location, or conditions of its execution. Thus,
20 Petitioner’s request for relief presumably should be asserted under section 2255.
21 *See* 28 U.S.C. § 2255(a); *Hernandez*, 204 F.3d at 864. Petitioner contends that
22 section 2255’s “savings clause”—also referred to as the “escape hatch”—applies,
23 allowing him to proceed with a section 2241 petition. (*See* Pet. at 2, 4-5.) *See* 28
24 U.S.C. § 2255(e); *Harrison v. Ollison*, 519 F.3d 952, 956 (9th Cir. 2008); *Stephens*,
25 464 F.3d at 897; *Hernandez*, 204 F.3d at 864-65.

26 Thus, whether Petitioner may proceed under section 2241 in this District
27 turns on whether section 2255’s escape catch applies.
28

1 **B. Petitioner Does Not Qualify for Section 2255’s Escape Hatch**

2 Petitioner contends that proceeding under section 2241 in this District is
3 appropriate because he is asserting actual and factual innocence. (Pet. at 2, 4.) He
4 contends that after his conviction, new Supreme Court decisions held that “crime of
5 violence” is unconstitutionally vague, and thus his convictions under the Racketeer
6 Influenced and Corrupt Organizations Act (“RICO”) and Violent Crimes in Aid of
7 Racketeering Act (“VICAR”) should be vacated. (*See id.* at 5-6.)

8 **1. Legal Standard**

9 As noted above, a section 2255 motion generally is “the exclusive means by
10 which a federal prisoner may test the legality of his detention.” *Stephens*, 464 F.3d
11 at 897. “The one exception to the general rule is what [is] called the ‘escape hatch’
12 of § 2255.” *Stephens*, 464 F.3d at 897; *see Harrison*, 519 F.3d at 956. “The escape
13 hatch permits a federal prisoner to file a habeas corpus petition pursuant to § 2241
14 to contest the legality of a sentence where his remedy under § 2255 is inadequate or
15 ineffective to test the legality of his detention.” *Stephens*, 464 F.3d at 897 (quoting
16 *Hernandez*, 204 F.3d at 864-65) (internal quotation marks omitted).

17 The escape hatch provision is found in 28 U.S.C. § 2255(e), which states:

18 An application for a writ of habeas corpus [on] behalf of a
19 prisoner who is authorized to apply for relief by motion
20 pursuant to this section, shall not be entertained if it
21 appears that the applicant has failed to apply for relief, by
22 motion, to the court which sentenced him, or that such
23 court has denied him relief, unless it also appears that the
24 remedy by motion is inadequate or ineffective to test the
25 legality of his detention.

26 In the Ninth Circuit, “a motion meets the escape hatch criteria of § 2255 when a
27 petitioner (1) makes a claim of actual innocence, and (2) has not had an
28 unobstructed procedural shot at presenting that claim.” *Harrison*, 519 F.3d at 959
(quoting *Stephens*, 464 F.3d at 898) (internal quotation marks omitted); *see Muth v.*

1 *Fondren*, 676 F.3d 815, 819 (9th Cir. 2012). These two requirements will be
2 addressed in turn.

3 **2. Petitioner Does Not State a Claim of Actual Innocence**

4 “[A] claim of actual innocence for purposes of the escape hatch of § 2255 is
5 tested by the standard articulated by the Supreme Court in *Bousley v. United States*,
6 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998).” *Stephens*, 464 F.3d at
7 898. “To establish actual innocence, petitioner must demonstrate that, in light of all
8 the evidence, it is more likely than not that no reasonable juror would have
9 convicted him.” *Bousley*, 523 U.S. at 623 (quoting *Schlup v. Delo*, 513 U.S. 298,
10 327-328, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)) (internal quotation marks
11 omitted); accord *Stephens*, 464 F.3d at 898. “It is important to note in this regard
12 that ‘actual innocence’ means factual innocence, not mere legal insufficiency.”
13 *Bousley*, 523 U.S. at 623-24 (citing *Sawyer v. Whitley*, 505 U.S. 333, 339, 112 S.
14 Ct. 2514, 2518-19, 120 L. Ed. 2d 269 (1992)), accord *Muth*, 676 F.3d at 819.
15 Rather, “[a] petitioner is actually innocent when he was convicted for conduct not
16 prohibited by law.” *Alaimalo v. United States*, 645 F.3d 1042, 1047 (9th Cir.
17 2011).

18 a. Petitioner’s Claims Under *Johnson* and *Dimaya*

19 Petitioner contends that he was “convicted for only one predicate act that at
20 this point is no longer criminal in nature,” following the Supreme Court’s rulings in
21 *Johnson* and *Sessions v. Dimaya*, 138 S. Ct. 1204, 1210, 200 L. Ed. 2d 549 (2018).
22 (Pet. at 5; see *id.* at 6-7.) Petitioner argues that because he was convicted for only
23 one predicate act, after the Court vacates his conviction on count 13 for conspiracy
24 to commit murder, then count 1 also lacks the requisite predicate act to support his
25 conviction for conspiracy to commit racketeering. (*See id.* at 7.)

26 First, in denying Petitioner leave to amend his first section 2255 motion to
27 add a *Johnson* claim, the District Court observed that Petitioner “was not sentenced
28 under the Armed Career Criminal Act or classified as a ‘career offender.’” *Elkins*

1 v. *United States*, No. 4:16-cv-00645-CDP (E.D. Mo.), Dkt. No. 19 at 12. The
2 District Court therefore determined that *Johnson* did not apply to Petitioner's
3 conviction and sentence, so amendment to add a *Johnson* claim would be futile. *Id.*

4 Similarly, *Dimaya* does not apply to Petitioner's conviction and does not
5 support a claim of actual innocence. In *Dimaya*, the Supreme Court held that the
6 residual clause of the federal criminal code's definition of "crime of violence" is
7 unconstitutionally vague.³ See *Dimaya*, 138 S. Ct. at 1223. But Petitioner was not
8 convicted of committing a "crime of violence." Petitioner was convicted of
9 conspiracy to commit racketeering in violation of 18 U.S.C. § 1962(d).
10 "Racketeering activity" includes "any act or threat involving murder." 18 U.S.C.
11 § 1961(1). Petitioner was also convicted of violating 18 U.S.C. § 1959(a)(5), which
12 punishes anyone who "murders, kidnaps, maims, assaults with a dangerous weapon,
13 commits assault resulting in serious bodily injury upon, or threatens to commit a
14 crime of violence . . . or attempts or conspires so to do" for the benefit of an
15 enterprise engaged in racketeering activity. 18 U.S.C. 1959(a)(5). Petitioner's
16 conviction was predicated on conspiracy to commit murder, not a vague "crime of
17 violence." See Judgment, *United States v. Smith, et al.*, No. 4:11-cr-00246-CDP-12
18 (E.D. Mo.), Dkt. No. 1491; see also Pet. at 5 ("convicted of RICO & VICAR
19 conspiracy to commit murder"); *id.* at 6 ("My conviction of Count XIII VICAR
20 conspiracy to commit murder").

21 Therefore, these cases do not support Petitioner's claim that he was convicted
22 for conduct not prohibited by law, and Petitioner has not stated a claim of actual
23 innocence.

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27 ³ The residual clause provides that "any other offense that is a felony and that, by its nature,
28 involves a substantial risk that physical force against the person or property of another may be
used in the course of committing the offense" is a "crime of violence." 18 U.S.C. § 16(b).

1 b. Petitioner’s Other Claims

2 Petitioner also contends that during his criminal trial, he was shackled in the
3 presence of the jury and his attorney appeared to be heavily medicated. Construing
4 these claims as raising claims related to due process and ineffective assistance of
5 counsel, these are not claims of actual innocence as that term is meant in the
6 context of section 2255’s escape hatch because Petitioner does not challenge the
7 factual evidence leading to his conviction. *See Bousley*, 523 U.S. at 624 (“‘[A]ctual
8 innocence’ means factual innocence, not mere legal insufficiency.”). As a result,
9 Petitioner does not qualify for section 2255’s escape hatch. *See Schlup*, 513 U.S. at
10 316 (“Without any new evidence of innocence, even the existence of a concededly
11 meritorious constitutional violation is not in itself sufficient to establish a
12 miscarriage of justice that would allow a habeas court to reach the merits of a
13 barred claim.”).

14 **3. Petitioner Did Not Lack an Unobstructed Procedural Shot to**
15 **Present His Claims**

16 The second requirement to qualify for section 2255’s escape hatch is the lack
17 of an unobstructed procedural shot for the petitioner to have previously presented a
18 claim. *Harrison*, 519 F.3d at 959. Section 2255’s escape hatch “is narrow,” and its
19 “remedy is not inadequate or ineffective merely because § 2255’s gatekeeping
20 provisions prevent the petitioner from filing a second or successive petition.” *Ivy v.*
21 *Pontesso*, 328 F.3d 1057, 1059 (9th Cir. 2003) (internal quotation marks omitted).
22 Thus, the “general rule in [the Ninth Circuit] is that the ban on unauthorized second
23 or successive petitions does not per se make § 2255 inadequate or ineffective.”
24 *Stephens*, 464 F.3d at 898 (quoting *Loretsen v. Hood*, 223 F.3d 950, 953 (9th Cir.
25 2000)) (internal quotation marks omitted). Further, “[t]he remedy under § 2255
26 usually will not be deemed inadequate or ineffective merely because a prior § 2255
27 motion was denied or because a remedy under § 2255 is procedurally barred.”
28 *Reed v. Matevousian*, No. 1:15-cv-01019-SKO HC, 2016 WL 7374586, at *3 (E.D.

1 Cal. Dec. 20, 2016) (citing *Aronson v. May*, 85 S. Ct. 3, 5, 13 L. Ed. 2d 6 (1964);
2 *Tripathi*, 843 F.2d 1160, 1162-63 (9th Cir. 1988)).

3 The dispositive inquiry is whether Petitioner’s claim “was unavailable to him
4 during his direct appeal and his first § 2255 motion.” *Alaimalo v. United States*,
5 645 F.3d 1042, 1047 (9th Cir. 2011). This requires the Court to consider
6 “(1) whether the legal basis for petitioner’s claim did not arise until after he had
7 exhausted his direct appeal and first § 2255 motion; and (2) whether the law
8 changed in any way relevant to petitioner’s claim after that first § 2255 motion.”
9 *Harrison*, 519 F.3d at 960 (citation omitted) (quoting *Stephens*, 464 F.3d at 898;
10 *Ivy*, 328 F.3d at 1060-61 (internal quotation marks omitted)). “An intervening
11 court decision must effect a material change in the applicable law to establish
12 unavailability” of a claim on direct appeal or in a prior section 2255 motion.
13 *Alaimalo*, 645 F.3d at 1047 (citing *Harrison*, 519 F.3d at 960).

14 Petitioner asserts a claim arising from him being shackled in the presence of
15 the jury “without any justification.” (Pet. at 7.) Petitioner also alleges that during
16 his criminal trial, his attorney was heavily medicated due to cancer treatments. (*Id.*
17 at 8.) Petitioner seeks an evidentiary hearing on this claim. (*Id.*) The legal basis
18 for these claims was already established at the time of Petitioner’s direct appeal and
19 first section 2255 motion. Indeed, Petitioner raised both of these claims within his
20 first section 2255 motion, and the district judge denied his petition and his request
21 for an evidentiary hearing. See *Elkins v. United States*, No. 4:16-cv-00645-CDP
22 (E.D. Mo.), Dkt. No. 1 at 12-19, Dkt No. 19 at 3-11. Petitioner therefore cannot be
23 said to have lacked an unobstructed procedural shot to present these claims.

24 Petitioner also relies on *Johnson* to argue that the one predicate act
25 supporting his conviction is “no longer criminal in nature” and that VICAR
26 conspiracy to commit murder is no longer a “crime of violence.” (Pet. at 5-6.)
27 Petitioner cannot demonstrate that this basis for his claim was unavailable during
28 his prior section 2255 motion. Petitioner filed his prior section 2255 motion in May

1 2016, nearly a year after *Johnson* was decided in June 2015. Moreover, the District
2 Court denied Petitioner’s request to amend his section 2255 motion to raise a
3 *Johnson* claim, finding that such an amendment would be futile because *Johnson*
4 did not apply to the manner in which Petitioner was sentenced. *See Elkins v. United*
5 *States*, No. 4:16-cv-00645-CDP (E.D. Mo.), Dkt. No. 19 at 12. Thus, the basis for
6 this claim was also already established—and was raised by Petitioner—at the time
7 of his first section 2255 motion. *See Harrison*, 519 F.3d at 960 (the Court
8 considers whether the legal basis for the claim arose after a petitioner’s appeal and
9 section 2255 motion and whether the law changed thereafter). Petitioner cannot be
10 said to have lacked an unobstructed procedural shot to present his *Johnson* claim.

11 For this additional reason, the instant Petition does not qualify for section
12 2255’s escape hatch.⁴

13 **C. Dismissal Rather than Transfer of This Action Is Appropriate**

14 The Court has concluded that the instant Petition does not qualify for section
15 2255’s escape hatch and that Petitioner must proceed, if at all, by way of a section
16 2255 motion in the Eastern District of Missouri. Consequently, the Court must
17 determine whether to transfer this action to that District or to simply dismiss it.

18 Pursuant to 28 U.S.C. § 1631, “[w]henever a civil action is filed in a
19 court . . . and that court finds that there is a want of jurisdiction, the court shall, if it
20 is in the interest of justice, transfer such action . . . to any other such court in which
21 the action . . . could have been brought at the time it was filed” This statute
22 applies in habeas proceedings. *See Cruz-Aguilera v. I.N.S.*, 245 F.3d 1070, 1074

23
24 ⁴ Petitioner also asserts that his conviction should be vacated pursuant to *Dimaya* for the
25 same reasons raised with respect to *Johnson*. (Pet. at 2, 5-7.) *Dimaya* was decided by the
26 Supreme Court on April 17, 2018, eight days after the District Court denied Petitioner’s first
27 section 2255 motion. But as previously discussed, the claim asserted under *Dimaya* is not one of
28 actual innocence. Petitioner therefore does not qualify for section 2255’s escape hatch with
respect to this claim regardless whether he had an unobstructed procedural shot to present it. *See*
Harrison, 519 F.3d at 959 (a section 2255 motion satisfies the escape hatch criteria when a
petitioner makes a claim of actual innocence *and* he lacked an unobstructed procedural shot at
presenting the claim).

1 (9th Cir. 2001); *Miller v. Hambrick*, 905 F.2d 259, 262 (9th Cir. 1990); *see also*
2 *Muth*, 676 F.3d 815 (“If the district court construes the filing as a § 2255 motion
3 and concludes that it therefore lacks jurisdiction, it may transfer the case to the
4 appropriate district.”). “Transfer is appropriate under § 1631 if three conditions are
5 met: (1) the transferring court lacks jurisdiction; (2) the transferee court could have
6 exercised jurisdiction at the time the action was filed; and (3) the transfer is in the
7 interest of justice.” *Cruz-Aguilera*, 245 F.3d at 1074 (citing *Kolek v. Engen*, 869
8 F.2d 1281, 1284 (9th Cir. 1989)).

9 Here, this Court lacks jurisdiction over the instant Petition, and so the first
10 requirement for transfer is satisfied. As discussed above, section 2255 motions
11 must be filed in the sentencing court, while section 2241 petitions must be filed in
12 the custodial court. *Hernandez*, 204 F.3d at 864; *see* 28 U.S.C. §§ 2241(d),
13 2255(a). The determination of which provision provides the proper avenue for
14 relief implicates a court’s jurisdiction over the matter. *See Hernandez*, 204 F.3d at
15 865 (“An inquiry into whether a § 2241 petition is proper . . . is critical to the
16 determination of district court jurisdiction.”); *see also Muth*, 676 F.3d at 818. In
17 this case, Petitioner does not qualify for section 2255’s escape hatch, and therefore
18 this Court lacks jurisdiction.

19 The second condition for transfer is not satisfied in this case. If brought as a
20 section 2255 motion in the Eastern District of Missouri, the instant Petition would
21 be a second or successive motion, as Petitioner previously has filed (and was denied
22 relief on) a section 2255 motion. Petitioner thus would have to obtain authorization
23 from the Eighth Circuit in order to proceed, and his failure to obtain authorization
24 would deprive the Eastern District of Missouri of jurisdiction over the motion. *See*
25 28 U.S.C. § 2255(h). A search of the Eighth Circuit’s docket reveals that Petitioner
26 does not have the requisite authorization. Petitioner filed a request, dated August 7,
27 2018, for leave to file a second or successive section 2255 motion “in the event of
28 a[n] adverse decision” in his Eighth Circuit request for a certificate of appealability.

1 See *Elkins v. United States*, No. 18-2122 (8th Cir.), Dkt. No. 9. The docket text
2 indicates that “NO ACTION WILL BE TAKEN with this ‘motion for second and
3 successive 2255,’ submitted [sic] in case pending appeal is denied.” *Id.* Petitioner’s
4 request for a certificate of appealability remains pending before the Eighth Circuit.
5 Thus, the Eastern District of Missouri could not exercise jurisdiction over this
6 action.


7 The third condition for transfer also is not satisfied in this case. Because the
8 Eastern District of Missouri could not exercise jurisdiction over the Petition,
9 transfer of this action would not further the interests of justice. See *Cunningham v.*
10 *Langford*, No. CV 16-5942 JAK (SS), 2016 WL 6637949, at *5-6 (C.D. Cal. Oct.
11 13, 2016) (dismissing rather than transferring a putative section 2241 petition, and
12 stating that “the [Court of Appeals for the transferee district] has previously denied
13 Petitioner leave to present his claim through a § 2255 motion, so transfer would
14 likely be futile” (citation omitted)), *report and recommendation adopted*, 2016 WL
15 6635626 (C.D. Cal. Nov. 9, 2016).

16 For these reasons, transfer of this action is not warranted, and dismissal is
17 appropriate.

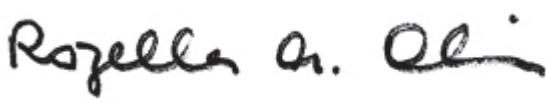
18 **III. ORDER**

19 Based on the foregoing, IT IS ORDERED THAT the Petition is
20 **DISMISSED** without prejudice for lack of jurisdiction.

21 DATED: August 28, 2018

22 
23 GARY KLAUSNER
UNITED STATES DISTRICT JUDGE

24 Presented by:

25 
26 _____
27 ROZELLA A. OLIVER
28 UNITED STATES MAGISTRATE JUDGE